APR 19 1946
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 1000.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, a Foreign Corporation, *Petitioner*,

v.

ADA SMOOT, *Respondent*.

BRIEF OF RESPONDENT.

STANLEY H. KAMEROW,
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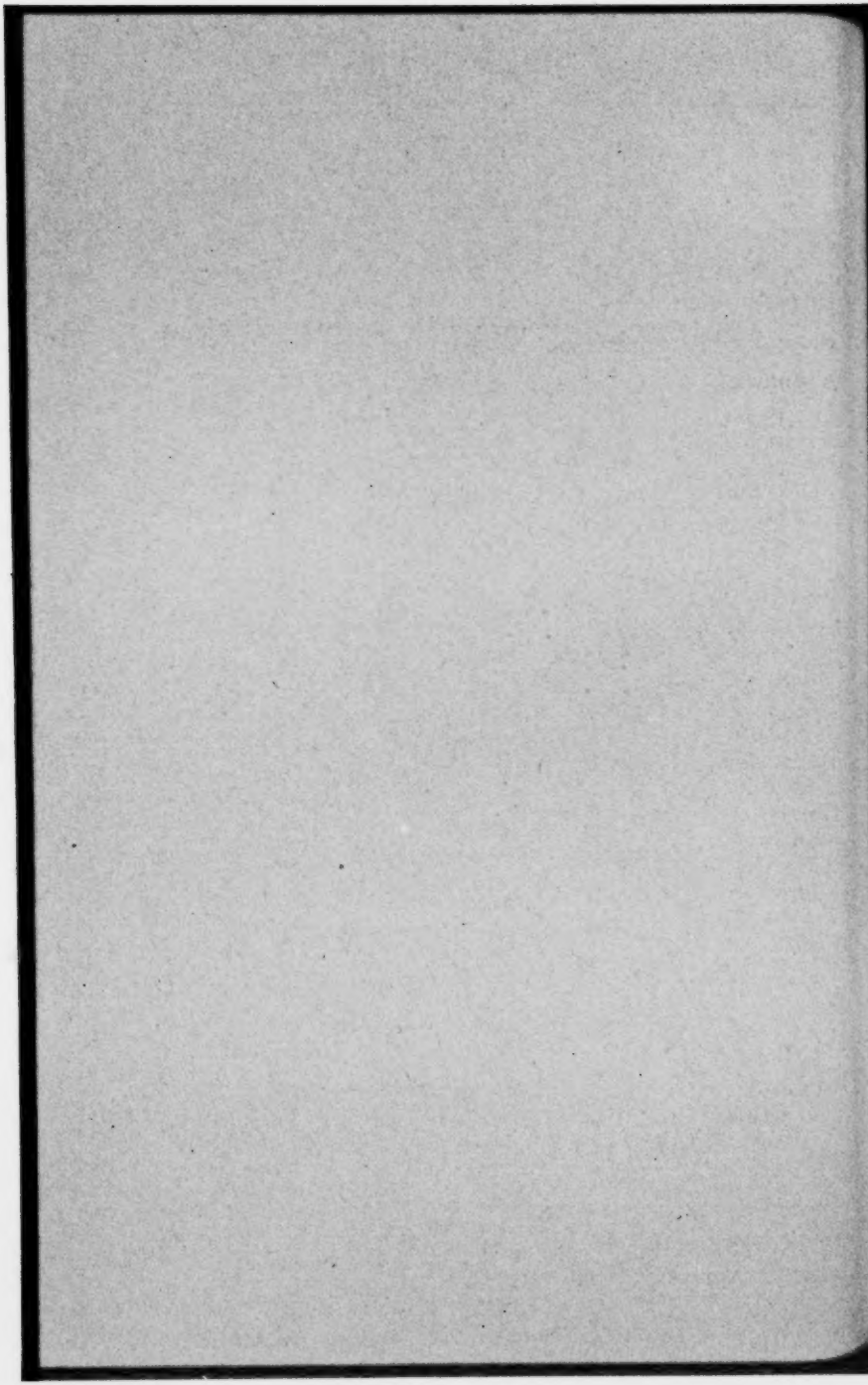

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BRIEF OF RESPONDENT.

INTRODUCTION.

The Petitioner, Indemnity Insurance Company of North America, in 1931 became the surety on the appeal bond of one Hollingsworth. In 1932 the case which was being appealed by Hollingsworth was affirmed and thereafter in 1932 a judgment in the amount of $7,993.75 with interest and costs from date was entered in the Supreme Court of Vermillion County, Illinois. No appeal was taken from the

entry of this judgment and the same has never been satisfied. Petitioner herein took no steps to set the same aside until January 29, 1945. On September 16, 1944 the respondent filed suit against the petitioner on the Illinois judgment. The District Court granted the respondent's motion for a judgment on the pleadings and the case was thereafter affirmed by the United States Court of Appeals for the District of Columbia.

SUMMARY OF ARGUMENT.

Point I.

The original judgment entered in the Illinois Court, which had competent jurisdiction over the parties, is conclusive not only as to matters which were actually in issue and decided in that suit, but also as to other issues which the parties might have litigated and which might have been decided as incident to or substantially connected with the subject matter of the litigation.

Point II.

The Illinois judgment was not subject to collateral impeachment as long as it remained in force and effect.

Point III.

A suit to set aside a judgment is in personam and service by publication is not sufficient in such a case.

Point IV.

The defense as stated by petitioner, if otherwise admissible, would be against public policy.

Point V.

The defense as stated by petitioner would, if otherwise admissible, be violative of the statute of frauds of the State of Illinois.

ARGUMENT.

As to Point I.

The original judgment entered in the Illinois Court, which had competent jurisdiction over the parties, is conclusive not only as to matters which were actually in issue and decided in that suit, but also as to other issues which the parties might have litigated and which might have been decided as incident to or substantially connected with the subject matter of the litigation.

If there was actually no obligation upon the petitioner to pay the amount claimed in the suit filed in the Illinois Court, then it was the duty of the petitioner to set up this defense in the original Illinois action, and if the petitioner failed to set up the defense it will now be precluded from setting up such a defense which is in effect a collateral attack upon the judgment itself.

Mr. Justice Field speaking for this Court said:

> "It (judgment) is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. *If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed.* The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim

in controversy. Such demand or claim, having passed into judgment cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever." (Italics supplied.) Cromwell v. County of Sac, 94 U. S. 351.

It is fundamental that in an action on a judgment the original cause of action cannot be examined on the merits, the area of attack being limited to jurisdiction and fraud in procurement.[1]

As to Point II.

The Illinois judgment was not subject to collateral impeachment as long as it remained in force and effect.

The Illinois judgment is in full force and effect. Petitioner has interposed a defense which would, if successful, collaterally attack the judgment of the Illinois Court.

Even if it be assumed that the petitioner's Illinois judgment was voidable, it is not subject to collateral impeachment as long as it remained in force.[2]

As to Point III.

A suit to set aside a judgment is in personam and service by publication is not sufficient in such a case.

The petitioner obtained an order vacating the Illinois judgment after having obtained jurisdiction over the respondent by publication. The Illinois Courts, District of Columbia Courts and this Court have all examined the question raised by the petitioner and all of these courts have held that service by publication is insufficient. The Illinois Courts have specifically held that proceedings involving a judgment are not proceedings in rem, especially where the original judgment is a judgment in personam as in this case. *Bickerdike* v. *Allen*, 157 Ill. 95, 41 N. E. 740, 29 LRA 782. Also see, 126 ALR 664.

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[1] *Christmas* v. *Russell*, 72 U. S. 290; *Moore* v. *Draft*, 179 Fed. 685.

[2] *Elliott* v. *Peirsol*, 1 Pet. 328; *Andas* v. *Highland Ect. Co.*, 205 Fed. 862.

The United States Court of Appeals for the District of Columbia has held that a suit to cancel an assignment of a patent is a suit in personam and not in rem and that personal service of process within the state upon the defendants is necessary to confer jurisdiction upon the Court. *Backus Portable Steamheater Co.* v. *Simonds*, 2 App. D. C. 290.

In *Staffan* v. *Zeust*, 10 App. D. C. 260, the same Court held that an action of ejectment in the District of Columbia is an action in personam and not in rem. That Court also held that a case in settlement of a claim against the Government involved proceedings in personam and not in rem.

In *Bickerdike* v. *Allen*, *supra*, the Illinois Supreme Court quotes with approval the language of Mr. Justice Field in *Pennoyer* v. *Neff*, 95 U. S. 714, 727, wherein it is said:

> "But where the entire object of the action is to determine the personal rights and obligations of the defendants—that is, where the suit is merely in personam—constructive service in this form upon a non-resident is ineffectual for any purpose. Process from the tribunals in one State cannot run into another State and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the State where the tribunal sits cannot create any greater obligation upon the non-resident to appear. Process sent to him out of the State and process published within are equally unavailing in proceedings to establish his personal liability."

As to Point IV.

The defense as stated by petitioner, if otherwise admissible, would be against public policy.

If the petitioner were permitted to interpose the defense upon which it relies, there would arise a controversy involving facts attempting to go behind a judgment. There must be an end to litigation. If a defense of this type were allowed to stand, there would be no end to litigation and no judgment would be a finality.

As to Point V.

The defense as stated by petitioner would, if otherwise admissible, be violative of the statute of frauds of the State of Illinois.

The Statute of Frauds of the State of Illinois provides as follows:

> "No action shall be brought, whereby to charge—the defendant upon any special promise to answer for the debt, default or miscarriage of another person, or to charge any person—upon any agreement that is not to be performed, within the space of one year from the making thereof, unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." *Smith-Hurd* Ann. St. (Ill.) Ch. 59, ¶1.

It should be noted that nowhere in the record is there any allegation or contention that the agreement relied on by the petitioners was in writing and it must therefore be assumed that petitioner could not make such a showing. Examination of the defense which petitioner attempted to set up will show on its face that it violates the Statute of Frauds of the State of Illinois and that the District Court was fully justified in granting respondent's motion for a judgment.

The Bank of Georgetown Case.

Petitioner relies heavily upon two cases in this Court, *The Union Bank of Georgetown* v. *Geary*, 5 Pet. 99, 8 L. Ed. 60; *Cage* v. *Cassidy*, 64 U. S. 109, 16 L. Ed. 430. These cases are easily and clearly distinguishable from the case at bar. The Court below in its opinion specifically stated (R. p. 26):

> "It is fundamental that in an action on a judgment the original cause of action cannot be examined on the merits, the area of attack being limited to jurisdiction and fraud in procurement."

This statement of the law has not been in any way questioned by the petitioner and is so well settled that no argument can be made concerning the same.

However, an examination of the two cases relied on by the petitioner will show that both of these cases involve *fraud in procurement*, thus squarely come within the exception laid down by the Court below and by this Court in the cases referred to.

The Union Bank of Georgetown case involved facts wherein the defendant had a good and valid defense to the original suit but where the attorney *through fraud* prevented the defendant from having her day in Court. The Cage case involved facts where there was a good defense to the original action but where, because of *fraud*, the defendant was prevented from having his day in Court.

Nowhere in this Court or in the Courts below has the petitioner alleged that the original judgment in Illinois was fraudulently procured and thus the facts come within the well settled rule and follow outside of the only exception to the rule which the Courts have recognized.

CONCLUSION.

It is respectfully submitted that no error has been shown in the court below and that the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia should be denied.

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